2013 WL 7121490 (Ind.App.) (Appellate Brief)
Court of Appeals of Indiana.

In the Matter of: THE SUPERVISED ESTATE OF MILDRED BORGWALD, Deceased, Appellant,

v.

OLD NATIONAL BANK AND RAELYNN POUND, Appellees.

No. 84A01-1302-ES-00080.
October 30, 2013.

Appeal from the Vigo Superior Court Trial Court Cause No.: 84D01-1004-ES-3250
Honorable John T. Roach, Judge.

Brief of Appellee Old National Bank

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II.STATEMENT OF CASE

ONB generally concurs with the Estate's Statement of the Case. The Estate, however, omitted some items [1] and information that are relevant for this Court's consideration of the issues on appeal. During the first hearings in this matter, the personal representative of the Estate, Lana McGee, made it clear that she would assert that Mildred Borgwald was not competent when she [Mildred] applied for the mortgage loan with ONB and signed the loan agreement and real estate mortgage. (Appellee's App. 1) The personal representative and her counsel indicated that they had a ***2** report from a physician regarding Mrs. Borgwald's condition, which they had planned to use to establish a guardianship prior to her death. (App. 74) On January 16, 2011 counsel for ONB sent a letter to the Estate's counsel requesting the report. (App. 74) On April 13, 2011, the Court issued its first pre-trial order, with the Estate's preliminary list of witnesses, exhibits and contentions due on May 13, 2011. (App. 8). The Estate failed to timely file its preliminary list. On June 3, 2011, ONB again wrote counsel requesting the Estate to identify the doctor whom it would call as a witness and to provide any written report. (App. 74) No response to either the January 2011 or June 2011 letter was received. (App. 74)

The Estate filed its initial witness list, exhibit list and contentions two months late, on July 8, 2011. (App. 67) The Estate's list disclosed three potential expert medical witnesses, Dr. Janicki, Dr. Gillespie, and Dr. Mardini, all of whom were identified as treating physicians. (App. 67).

The September 2011 trial was vacated after the Estate added Pound as a party. (App. 9) The Trial Court subsequently conducted another pre-trial conference and set new pre-trial deadlines. (App. 10) Trial was set for April 27, 2012, with preliminary witness lists, exhibit lists and contentions to be exchanged on January 16, 2012, discovery to be completed by February 15, 2012, and final witness lists, exhibit lists and contentions to be filed by April 9, 2012. (App. 10-11) The Estate failed to file a preliminary list of witnesses, exhibits, and contentions. As a result, ONB and Pound filed their initial Joint Motion to Exclude. (App. 73) ONB and Pound argued that the Estate had failed to produce any expert reports or additional medical records after the discovery deadline and that any subsequently-obtained records and reports, including expert witness testimony, should be excluded. (App 73)

***3** On April 16, 2012, the Estate served a belated final list of witnesses, exhibits and contentions. (Appellee's App. 3)[2] This witness list again disclosed as potential expert medical witnesses Dr. Janicki, Dr. Gillespie and Dr. Mardini. (Appellee's App. 4). On April 23, 2012, the Trial Court conducted a pre-trial conference and hearing on the Motion to Exclude, as indicated on page 4 of Appellant's Brief.

In accordance with the Trial Court's Order following the pre-trial conference, on April 24, 2012, ONB served new discovery requests to the Estate, seeking information about the Estate's expert witnesses, including their identities, the content of their opinions, and the records upon which they relied. (App. 87). On May 30, 2012, ONB filed a Renewed Motion to Exclude, arguing that (a) the Estate failed to respond to ONB's Interrogatories (b) the Estate failed to provide formal written responses and objections to the Requests for Production[3] (c) for the first time, the Estate disclosed Dr. Robert Lalouche as a testifying expert, and (d) the Estate missed the Trial Court's May 7, 2012 deadline to provide certified medical records, instead providing them on May 29, 2012. (App. 79) The Estate did not provide a written report from Dr. Lalouche with the documents it produced. (App. 79) On June 14, 2012, the Trial Court conducted a hearing on the Renewed Motion to Exclude. (App. 15). The Trial Court conditionally granted the Renewed Motion and summarized the state of discovery and delay of the proceedings:

This claim has been pending since July 15, 2010. On April 13, 2011, a pre-trial order was entered requiring ONB and the Estate to file preliminary witness and exhibit lists and contentions by May 13, 2011. The order also set a trial date and other pre-trial deadlines. ONB timely filed its preliminary list of witnesses, ***4** exhibits. The Estate did not. It wasn't until July 18, 2011 that the Estate complied with that part of the order.

Raelynn Pound was added as a party, the trial date was vacated and a new pretrial order was entered on December 16, 2011 setting new deadlines and a trial date of April 27, 2012. ONB and Pound complied with the court's pre-trial order. The Estate, again, failed to comply. ONB and Pound filed a motion to exclude expert witness testimony based on the Estate's failure to comply with the court's order and failure to provide discovery. The motion to exclude was denied, however it was not denied based on a finding the Estate was in compliance with its pre-trial and discovery obligations. The Estate was cautioned that new deadlines were going to be established, once again, and that strict compliance was expected. The trial was vacated and new deadlines established by order dated April 23, 2012. As ordered, ONB served formal discovery requests concerning expert opinions and medical records on April 24, 2012.

On May 30, 2012, ONB and Pound renewed their motion to exclude alleging, once again, the Estate's failure to comply with this court's pre-trial order. It did not file stipulations, it did not timely file a pared down final list of witnesses and exhibits, it did not timely answer discovery served upon it, and it did not timely provide certified copies of medical records. (Appellee's App. 7)

The Estate proposed to have Dr. Robert Lalouche, a non-treating physician, testify as an expert and offer an opinion as to Mildred Borgwald's mental state. The Trial Court laid out conditions for introduction of Dr. Lalouche's testimony:

1. The Estate will provide a written report from Dr. Lalouche setting forth the substance of the facts and opinions to which Dr. Lalouche is expected to testify and a summary of the grounds for each opinion

2. Dr. Lalouche, if requested, will be made available for deposition no later than August 3, 2012.

3. The Estate will bear the expense of providing the above referenced discovery.

(Appellee's App. 7-8)

In accordance with the June 14, 2012 Order, the Estate produced Dr. Lalouche's report on July 6, 2012. (App. 93) The report disclosed for the first time that Dr. Lalouche was a non-treating gynecologist. (App. 94) ONB and Pound then filed a Motion to Reconsider the denial of ***5** their earlier Renewed Motion to Exclude, supplying this new information about Dr. Lalouche's qualifications. (App. 96).

In accordance with the Trial Court's June 14, 2012 Order, the Estate was to make Dr. Lalouche available for deposition, at its expense, no later than August 3, 2012. (Appellee's App. 8) Instead, the Estate noticed a video deposition, which it intended to use in lieu of Dr. Lalouche's trial testimony, for July 19, 2012. (App. 98) The Estate refused to make Dr. Lalouche available for a discovery deposition. (App. 102-3) In light of the pending Motion to Reconsider, and the Estate's failure to make Dr. Lalouche available for a discovery deposition, on July 13, 2012, Pound filed a Motion to Quash the scheduled video deposition. (App. 99) On July 13, 2012, the Trial Court granted the Motion to Quash. (App. 16)

On July 18, 2012 the Trial Court made an Order to grant the motion to exclude Dr. Lalouche's testimony. (App. 107) The Order discusses three points: (a) that the Estate refused to make the doctor available for anything other than a video deposition for trial, in contravention of the court's prior orders; (b) that Dr. Lalouche was engaged to render an opinion about the mental state of a patient whom he did not treat and had never met; (c) and that the doctor intended to testify solely on the basis of medical records. (Id.) The Trial Court noted that the doctor's report did not specify which records he had been provided. (Id.) No records which Dr. Lalouche's report does mention corresponded to the time period at issue: October 2007. (Id.)

The Trial Court conducted a final pre-trial conference on August 3, 2012. (App. 17) At the conference, the Estate attempted to name additional expert witnesses, and requested a continuance of the trial. (App. 109) Following the conference, the Trial Court entered an Order denying those requests. (App. 109) The Court stated, in pertinent part:

Contrary to the Estate's assertions, it is clear the objections to the continuance and to the last minute additions to the witness list are not based on hyper-technical ***6** applications of this court's orders or the trial rules designed to gain an unfair advantage to deny the Estate a fair trial. What is equally clear is that the Estate has consistently failed to abide by pre-trial orders entered in this case, and has failed to take advantage of opportunities and second chances to get its case in order.

(App. 109) The Trial was conducted, a judgment was entered for ONB and Pound, and this appeal ensued, as discussed on page 7 of Appellant's Brief.

III. STATEMENT OF FACTS

The Estate's Statement of Facts accurately presents some of the testimony and facts, but omits numerous portions of the record that are not favorable to its position, some of which came from its own witnesses. Personal Representative (and Mildred's daughter) Lana McGee did testify that in the years leading up to her death, from 2001-2007, her mother appeared confused at

various times. (Tr. 40-49). Lana also testified that, during the same period, her mother was left alone at her home, (Tr. 40) Lana only checked on her once a day. (Tr. 40) Borgwald was trusted to take her own medication. (Tr. 39, 155) She asked Lana to type up her recipes in large font, presumably so she could prepare her own food. (Tr. 43) She wrote out her own grocery list and made orders from the grocery store. (Tr. 39, 172) She was involved in the management of her own financial affairs, with Lana giving her cash to pay for various items to purchase. (Tr. 173) When the time came for Ms. Borgwald to pay bills, Lana helped her write checks, telling her where to sign, and describing the bill that was being paid. (Tr. 153-54) At the time Mildred Borgwald was to be released from the hospital in 2007, Lana McGee was concerned that her mother could not live alone (Tr. p. 54), but no arrangements were made to have anyone stay with her full time. (Tr. p. 150). Mildred Borgwald signed and dated the application for the mortgage loan with ONB. (Tr. p. 85).

***7** In a December 2007 telephone conversation with Lana, two months after the subject Note and Mortgage were executed, Mildred Borgwald was able to hear Lana, understand her questions, answer them appropriately, and relate the complex family tension between Raelynn and Lana. (Tr. 156-57)

ONB and Pound submitted evidence, which the Estate does not mention, tending to show that Mildred was competent. Attorney Patrick Duffy, Mildred's lawyer testified as follows:

[Direct examination by Attorney Sheehan]

Q: And do you recall the date of your visit?

A: Yes, it was June the 25th of 2007.

Q: And can you explain to the court what you observed when you arrived?

A: I went to Mrs. Borgwald's home, she had recently come back from the hospital, she indicated her doctor was trying to figure out whether she could live at home or whether she would have to go to a nursing home, and he had indicated that if she were to stay home, she had to have someone stay with her. At that time, uh, Miss McGee had essentially given up her role to the best of my knowledge, in taking care of her and her granddaughter, Raelynn Pound had stepped into that role. Now I have not done any additional documents, but she was taking care of her. When I went to see her at her house, I observed that she was - Mrs. Borgwald was neat and clean, the house was tidy, she seemed to feel pretty good, she spoke to me at some length and indicated that Raelynn was taking good care of her. Uh, and that she was trying to stay in the house if she could, uh, that's what she said.

Q: Did she appear happy?

A: She did.

Q: Did she appear oriented?

A: She did.

Q: Did you have any concerns about her mental competency at that time?

A: No, I didn‘t. She indicated - I mean I knew that she had some vision problems and she also indicated to me that she had some difficulty hearing, but - and she's an old lady, but those things being considered, I did not have any doubt that she was a competent person in that regard at that time.

Q: Do you routinely deal with **elderly**?

A: I do, I have a lot of **elderly** clients. (Tr. p. 63)

***8** Q The question was, if you had some serious concerns about Miss Borgwald's competency, would you have done anything differently, such as anything to bring it to the attention ...

A: If I were - if I had thought that she was not competent, uh, then I would have had some more concerns about third parties acting for her benefit, uh, without say a power of attorney or some other document, and I also would have thought that perhaps a guardianship would have been appropriate if other document, and I also would

have thought that perhaps a guardianship would have been appropriate if she indicated, if her demeanor indicated that she was not competent, uh, and might also conceivably called the Adult Protective Services if I thought that was the case, but I didn't see any need for any of that.

(Tr. pp. 64-65)

Q: Mr. Duffy, you indicated that you had a conversation with Miss Borgwald on the day of your visit?

A: Yes.

Q: Was she responsive to your questions?

A: Oh yes.

Q: Did she appear to be confused in any way to you?

A: She didn't. (Tr. p. 66)

Denise Keegan, the customer service representative at ONB who closed the mortgage loan with Mrs. Borgwald, testified about the application process and the process of executing the loan documents:

[Direct examination by Attorney Racop]

Q: Okay. Do you recall how this loan for Mildred Borgwald was initiated?

A: On the date of application, Mildred came into the bank with Raelynn Pound, and we discussed how a line of credit works, and through our discussion she chose to place application. (Tr. p. 207)

Q: Who was doing the talking?

***9** A: I spoke directly with the applicant. In our position we must speak directly to the applicant.

Q: Did you have to get rather close to her to be able for her to hear you?

A: Yes, because she did tell me at our first meeting that I would have to speak up, and that she had trouble seeing, which was clear to me because she wore thick glasses, and I said okay, and so I spoke clearly, slowly, and loudly to her.

Q: Were you aware that she could not see to read?

A: She told me that she had trouble seeing.

Q: Well I guess my question was, were you aware that she was not able to see to read?

A: No. She said I have trouble seeing, she explained that up front, and I have trouble hearing, and she told me that up front, so, I worked from there. (Tr. p. 212)

Q: Okay. When you were explaining to her or telling her about documents, did you read to her the application?

A: As I said before, the application is an on-line application, so what happens is, I would answer the questions as they come up on the on-line applications, I fill in the blanks. I will ask the questions one at a time as we go.

Q: Okay, I guess my question is, after you printed it out, did you read it to her?

A: You're referring to the credit application acknowledgment?

Q: Yes, the Exhibit No. “5.”

A: Yes, we do. We do, we go over what the information says on the application acknowledgment.

Q: I understand your answer of going over, but I guess my specific question, did you read the entire document to her before she signed it?

A: I can't recall reading exact word for word, but I do pick up the document. I do tell them, you know, that the reason they are signing this is that they are acknowledging that they have applied for the loan, and it does said that I'm applying and acknowledging applying for the loan. I let them know at that time too, that in the disclosure I will always state to my customers, in addition, if you are eligible, in addition to the loan application, we will offer to - we will offer you credit life insurance, credit disability, if you meet the criteria, uh, I will go paragraph by ***10** paragraph to explain to them what it is that it says, what it is that - yes, I read to them what it says, because it is an acknowledgment. (Tr. p. 213)

Following the date of the application, Ms. Keegan spoke to Mildred Borgwald on the telephone to set up an appointment to sign the loan documents. In response to questions from the Estate's counsel, Ms. Keegan described the closing:

[Direct examination by Attorney Racop]

Q: Was - did somebody have to show Mildred where to sign on these documents?

A: Any time I close a loan in general, I will present the document, I explain the document, I will- and if a signature on that document specifically is required, uh because there are a couple in there that will actually show them like a settlement statement for example on certain kinds of loans, but any time, yes, I will put the document, I'll explain it, I turn it around and I do indicate that you will sign above your name next to the “x” and please sign the way it is on the document. (Tr. p. 230)

Keegan explained all of the loan documents to Mildred before she signed them. (Tr. 251-52) Mildred was able to articulate why she was applying for a loan. (Tr. 254) She did not appear to be pushed into the transaction by Pound or anyone else. (Tr. 257) Keegan had no indication that Mildred was not competent to sign the documents and at no time believed that Mildred did not fully understand what she was doing. (Id.)

Finally, among the exhibits submitted to the Trial Court (and those included in the Estate's record in this appeal) are forms completed by the visiting nurse service which assisted Mildred Borgwald after her discharge from the hospital in July 2007. The practitioners who visited Mrs. Borgwald during that time obtained her signature on the following:

Agreement and Consent 7-2-07 (Tr. p. 114); (App. p. 162);

Financial Information and Consent 7-2-07 (Tr. p. 115); (App. p. 131);

Advance Directive Documentation Form 7-2-07 (Tr. p. 116); (App. p. 132);

Verification of receipt of privacy statements (Tr. p. 117); (App. p. 133);

***11** Notice of Medicare Provider Non-Coverage 7-23-07 (Tr. pp. 119-20); (App. pp. 135-6).

IV. SUMMARY OF THE ARGUMENT

A. The Trial Court Correctly Exercised its Discretion in Excluding the Testimony of Dr. Lalouche. Throughout the pre-trial process, the Estate ignored or failed to comply with the Court's pre-trial orders and offered empty promises to the Court and counsel for ONB and Raelynn Pound. The Estate repeatedly indicated that it would be calling Ms. Borgwald's treating physician, Dr. Janicki, to testify as to her mental state at the time she signed the Note and Mortgage to ONB in 2007. After the Estate failed to produce anything from Dr. Janicki - certified records, an expert report, or notice him for a deposition - the Court allowed the Estate a final attempt to produce a qualified expert medical witness. The Estate named Dr. Lalouche as its witness. Dr. Lalouche is a gynecologist/obstetrician. The Estate claims that the driving force behind the Court's exclusion of his testimony was that he was a non-treating physician. In fact, the Trial Court acted within its broad discretion when it excluded Dr. Lalouche's testimony because of the Estate's continuous violations of the Court's orders. The Trial Court also acted within its discretion to exclude Dr. Lalouche's testimony on the grounds that it would not assist the trier of fact on the issue of competence, given that Dr. Lalouche admittedly had no experience treating or diagnosing patients with neurological diseases or cognitive impairment and practiced exclusively as an OB/GYN.

B. The Trial Court correctly admitted redacted versions of the certified medical records offered into evidence by the Estate. Indiana law provides that while certified medical records generally qualify as business records and are not hearsay, the opinions and diagnoses therein are inadmissible unless accompanied by the testimony of a qualified expert to explain the meaning of the records to the fact-finder. The redactions - jointly done by the Estate, ONB and ***12** Pound - removed inadmissible hearsay opinion testimony from those records from doctors, nurses and other practitioners who treated Mildred Borgwald. This was the appropriate solution given the Estate's failure to offer a qualified expert. Further, the Estate waived the right to argue on appeal that the redactions were excessive. All of them were done by agreement, and the Estate did not object to any specific redactions when offering redacted records into evidence.

C. The Estate was not denied the opportunity to make an offer of proof. As the trial transcript shows, the Estate submitted, and the Trial Court accepted - Dr. Lalouche's written report as an offer of proof. The Estate was allowed to place substance and contents of his opinion are in the record. To the extent argues that it should have been able to call Dr. Lalouche to testify live, this argument was waived for purposes of appeal. Although the Estate initially wanted to have Dr. Lalouche testify, the Estate ultimately suggested that the Court accept his report as an offer of proof. The Estate consented at trial to this process and cannot argue that this was error on appeal.

D. The notary's purported failure to read the Mortgage to Mildred, who had difficulty seeing, does not affect the Mortgage's validity. The statute cited to this Court does not state that the failure to read the document to a blind person invalidates the document itself. It merely invalidates the acknowledgement. Indiana law is clear that even if a mortgage is defectively acknowledged it is binding between the parties. The Estate also submitted no evidence that the notary, Alice Weir, failed to read the mortgage to Mildred. Finally, the Estate never raised this legal argument to the Trial Court, and therefore waived the right to argue it on appeal.

E. Even if the Trial Court's decision to exclude Dr. Lalouche's testimony was erroneous it was harmless error. Indiana law provides that the exclusion of testimony is harmless ***13** if it was ultimately cumulative of other testimony already before the Court. Here, the Estate's other witnesses provided a large volume of testimony regarding their belief that Mildred was not competent to sign a mortgage. Dr. Lalouche's testimony would have been cumulative. And even if the Court had believed the Estate's witnesses, including Dr. Lalouche, the result would have been essentially unchanged. Because Mildred was not adjudged incompetent before the mortgage was signed, and because the Trial Court found that ONB did not act improperly in its dealings with Mildred, the Estate's only possible remedy would have been rescission. The Estate was not entitled to have the mortgage voided.

V. ARGUMENT

A. The Trial Court correctly excluded the testimony of the Estate's proffered expert witness.

The Trial Court properly excluded the testimony of Dr. Robert Lalouche, who the Estate offered as an expert witness to testify as to Ms. Borgwald's mental competency. The Trial Court's decision to exclude Dr. Lalouche's testimony was proper and was not an abuse of discretion. The ruling is justified by the Estate's repeated violations of the Trial Court's pre-trial orders relating to the expert witness disclosures and discovery. It is also justified by the fact that Dr. Lalouche was a non-treating OB/GYN, not a doctor practicing in a field of medicine relating to neurological diseases or the loss of cognitive function or in **elderly** patients.

1. The Estate's repeated violations of the Trial Court's pre-trial orders justified the exclusion of Dr. Lalouche's testimony. It is well-settled that the Trial Court has the power, when necessary, to enforce pre-trial discovery and the discretion to sanction parties which fail to comply with pre-trial orders. The rationale for the Trial Court's power, and the standard for review when its enforcement decisions are challenged, is summarized as follows;

***14** We assign the selection of an appropriate sanction for a discovery violation to the trial court's sound discretion. *McCullough v. Archbold Ladder Co.*, 605 N.E.2d 175 (Ind. 1993). Trial judges stand much closer than an appellate court to the currents of litigation pending before them, and they have a correspondingly better sense of which sanctions will adequately protect the litigants in any given case, without going overboard, while still discouraging gamesmanship in future litigation. We therefore review a trial court's sanction only for an abuse of its discretion. *Whitaker v. Becker*, 960 N.E.2d 111 (Ind. 2012)

Discretion is a privilege afforded a trial court to act in accord with what is fair and equitable in each case. ***. An abuse of discretion may occur if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court, or if the trial court has misinterpreted the law. ***. Exclusion of the testimony from an undisclosed witness is one of the sanctions available under Trial Rule 37(B)(2). McCullough v. Archbold Ladder Co., 605 N.E.2d 175. (Additional internal citations omitted).

This case is factually and procedurally identical to *Brown v. Terre Haute Regional Hospital*, 537 N.E.2d 54 (Ind. Ct. App. 1989). Brown was admitted to the hospital to be treated for traumatic injuries to his cervical spine as a result of a motor vehicle collision. Brown claimed that the hospital staff failed to properly maintain his spinal traction and that a delay in responding to a change in his condition caused him further injury. The *Brown* opinion's summary of the course of discovery is concise:

At the inception of this action the hospital sent interrogatories to Brown requesting information regarding his expert witnesses and Brown responded that he had not retained such persons. Since that time Brown has not formally supplemented his answers pursuant to Trial Rule 26(E)(1). Brown eventually verbally informed the hospital of five expert witnesses, one of whom was Dr. Worth.

A year later, and thirteen days before trial, Brown filed a witness list identifying a new expert witness who was deposed by the hospital four days before trial. The day after this deposition Brown identified yet another expert witness. Because of the late addition of these two experts, the hospital filed a motion to exclude their opinion testimony. In the alternative, the hospital

asked for a continuance of trial. The hospital also requested that Brown disclose whether any other previously deposed expert witness had developed additional opinions of which the hospital had not been advised, referring again to TR 26(E)(1).

***15** After first reserving its ruling, the court denied the hospital's motion to exclude testimony but granted a one week continuance of trial. The court's order states in part:

Court now denies Defendants Motion to exclude opinion testimony from said doctors and vocational experts and in alternative Court continues the trial of said cause until Monday the 20th day of April, 1987. Counsel directed to advise opposing counsel of any expert witnesses on said witness list who are now going to give opinion testimony or any witness who formerly had no opinion who now are going to give opinion testimony. Counsel ordered to depose all expert witnesses that they desire to and complete depositions prior to April 20, 1987.

Id. at 57. At his second deposition Dr. Worth did have new opinions, but did not mention the opinion concerning the effect a delay in responding to a patient's complaint of changed condition would have on his prognosis. Brown's counsel attempted to elicit that opinion from Dr. Worth at trial, but the testimony was excluded by the trial court. Id. at 58.

Brown appealed and argued that his failure to comply with the court order was at most a "technical failure." He asserted that exclusion of testimony on this ultimate issue, under the circumstances, was too harsh. He urged that "because of the informal nature of discovery in this case and because there has been no showing of bad faith, [the Court of Appeals] should go beyond the trial rules and apply principles of equity." The Court of Appeals disagreed, and noted that:

> Throughout discovery Brown was not cooperative. Because of his late addition of expert witnesses a continuance had to be granted. Dr. Worth was deposed for a second time at this juncture for the express purpose of describing his changed or additional expert opinion testimony. Brown was given ample opportunity to inform the hospital of Dr. Worth's expert opinion testimony. The trial court did not abuse its discretion when it "drew the line" and refused to allow Dr. Worth to testify to additional undisclosed opinions.

Id. at 58-9.

ONB is mindful that, recently, the Indiana Supreme Court delivered its opinion in *Wright v. Miller*, 989 N.E.2d 324 (Ind. 2013). In that case, the Supreme Court overturned a trial court ***16** decision to exclude a plaintiffs expert medical witness in a medical malpractice case. ONB submits that *Wright* is immediately distinguishable from the case at bar on the following points:
In *Wright* the defendants were made aware at the outset of the case that the plaintiffs intended to call a Dr. Nash as an expert medical witness (although the Wrights **neglected** to name Dr. Nash on their actual witness lists);

The delays which ensued because the Wrights sought to substitute a different medical expert was the result of Dr. Nash's illness and unavailability, not the Wrights' own noncompliance with court orders;

Expert medical testimony was indispensable to prosecution of the malpractice case. The practical effect of excluding the expert was to put the Wrights out of court.

As much to the point: in rendering the *Wright* opinion, our Supreme Court is scrupulous to preserve the utmost latitude for the trial court to enforce discovery and impose sanctions. The opinion includes a blunt dissent, Justice David, who would have upheld the exclusion of the expert witness, notes that Mrs. Wright filed her witness lists late, delayed filings, and failed to meet a discovery deadline that had been extended at her request.

No case in the jurisprudence of our state establishes a bright-line rule with respect to exclusion of expert (or other) witnesses for disobedience of court orders. However, the decisions tend to show a preference that the trial court impose lesser sanctions first, in lieu of excluding testimony, and that the noncompliant party be warned of the consequences in advance of the ultimate sanction. In this case, the Trial Court fashioned and delivered a series of orders, warnings and intermediate sanctions before ruling to exclude the Estate's proposed expert, a progression apparently lacking in *Wright.* The Trial Court admonished the Estate at the April 2012 pre-trial conference for its failure to comply with prior orders. (Appellee's App. 7) After the June pre-trial conference, the Trial Court ordered the Estate to bear the costs of expert discovery depositions and demanded strict compliance with future deadlines. (Appellee's App. ***17** 8) When the Estate disclosed Dr. Lalouche, a non-treating gynecologist, as its expert on mental competency and then refused to make him available for a discovery deposition, in direct violation of the June 14, 2012 Order, the Trial Court could no longer tolerate the Estate's conduct. Still, as noted in the discussion in Section E of this brief, the Estate's contention that Mildred Borgwald was incompetent did not depend upon the introduction of expert medical testimony, nor is the opinion of an expert necessarily dispositive of the issue. The Estate was able to muster testimony of its own from its lay witnesses to go forward, and to meet the evidence submitted by ONB. Thus, unlike the claimants in *Wright*, the Estate was not denied its day in court by the exclusion of Dr. Lalouche and the other proposed expert witnesses.

Finally, in July of 2012, the trial date in this matter was at its third setting. The controversy between the Estate and ONB had been pending for two years. Trial had been vacated twice before due as a result of the Estate's actions or inaction. ONB had been denied discovery of the Estate's proposed expert and then denied access to depose him. (App. 107) ONB's claim was to enforce a mortgage. The mortgage payments were unpaid since shortly after Mildred's death. The house was intermittently vacant. Each month ONB's loss was exacerbated by way of deferred maintenance, unpaid interest, taxes and insurance.

Had the Trial Court not excluded Dr. Lalouche, ONB and Raelynn Pound would have been obliged to compel a discovery deposition, which in turn would have necessitated a third continuance of the trial date. When the Trial Court excluded Dr. Lalouche, the Estate proposed to continue the trial and seek out testimony from one or more doctors previously unknown to ONB. ONB submits that without the Trial Court's order of July 18, 2012, the Estate's cavalcade of experts with opinions to offer would have had no end. The Trial Court had the benefit of overseeing all of pre-trial matters and interacting with the litigants and their counsel. In its ***18** discretion, the Trial Court determined that the Estate's history of non-compliance with pre-trial orders and deadlines was egregious enough to warrant exclusion of the Estate's purported expert.

2. The Trial Court properly excluded Dr. Lalouche's testimony based on a determination that, given his qualifications and experience, his testimony would not assist the trier of fact. Rule of Evidence 702 expressly states:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

"A trial court has broad discretion to admit or exclude the testimony of an expert witness." *Ollis v. Knecht,* 751 N.E.2d 825, 828 (Ind. Ct. App. 2001). Also, the party seeking to admit expert testimony has the burden to prove its admissibility. *Id* at 829-30.

In addition to the Estate's failure to comply with pre-trial orders, Dr. Lalouche was an OB/GYN. A review of his expert report reveals that he has practiced exclusively in that field for the entirety of his career. He never practiced in a field of medicine even tangentially related to neurological diseases or age-related cognitive impairment. Dr. Lalouche's statement that he has experience interacting with his own **elderly** patients is the only reference to him being qualified to assess the mental capacity of an **elderly** individual. The Court was justified in concluding that this experience had little value, in light of the fact that he never met Mildred Borgwald. In its discretion, the Trial Court reasonably concluded that Dr. Lalouche's report was not going to assist it in deciding the issue. Again, it was the Estate's burden to show that Dr. Lalouche was qualified as an expert. Any chance the Estate had to qualify Dr. Lalouche disappeared when it refused to make him available for a discovery deposition. The Trial Court was justified in excluding Dr. Lalouche based solely on his lack of qualifications to testify about the specific issue before the Trial Court.

***19 B. The Trial Court properly admitted redacted versions of the certified medical records.**

At her deposition, the personal representative (Lana McGee) had in excess of 200 copied pages of Mildred Borgwald's medical records. Prior to trial, the Estate had over 900 pages. (App. Notwithstanding discovery requests by ONB and Raelynn Pound, the Estate made no written response to describe, index, sort or prioritize the mass of records. The 53 pages brought to trial by the Estate appear to be form-style compilations made by nurses and physical therapists who assisted Mildred Borgwald while she was hospitalized in 2007 and for a period of time after she was discharged to her home. In some instances the forms are supplemented by narrative handwritten notes and references to physician orders and prescriptions.

The Estate complains that the Trial Court erred when it ruled that diagnoses and the opinions of physicians, nurses and other health-care providers contained in the medical records could not be introduced directly into evidence at trial from certified copies of the records themselves. Physician reports and other medical records may meet the criteria of business records under Evidence Rule 803(6) and therefore are not excluded by the hearsay rule. However, even records that are not excluded by the hearsay rule must also be otherwise admissible. *Brooks v. Friedman,* 769 N.E.2d 696 (Ind. Ct. App. 2002).

For medical opinions and diagnoses to be admissible, they must meet the requirements for expert opinions set forth in Indiana *Evidence Rule 702. Estate of Dyer v. Doyle,* 870 N.E.2d 573, 579 (Ind. Ct. App. 2007) (citing *Wilkinson v. Swafford,* 811 N.E.2d 374 (Ind. Ct. App. 2004), abrogated on other grounds by *Willis v. Westerfield,* 839 N.E.2d 1179 (Ind. 2006)), trans. denied. Pursuant to Rule 702, the subject matter must be distinctly related to some scientific field, business, or profession beyond the knowledge of the average person. ***20** *Schaefer v. State,* 750 N.E.2d 787, 793 (Ind. Ct. App. 2001). In addition, the witness must have sufficient skill, knowledge, or experience in that area so that the opinion will aid the trier of fact. *Id.*

Importantly, "'[e]xpressions of opinion within medical or hospital records historically have not been admissible under the business records exception because their accuracy cannot be evaluated without the safeguard of cross-examination of the person offering the opinion."' *Schaefer,* 750 N.E.2d at 794, quoted in *Dyer,* 870 N.E.2d at 579.

So, in *Flores v. Gutierrez,* 951 N.E.2d 632 (Ind. Ct, App. 2011) where Flores sought to introduce medical records directly relating to his treatment by certain experts whose credentials were never established and who were not available for cross-examination, the Court of Appeals found no abuse of discretion in the trial court's exclusion of those exhibits.

Now, the Estate argues that had Dr. Lalouche been allowed to testify, he could have explained the significance of the comments and evaluations made by the various nurses and therapists who attended Mildred Borgwald. But the doctor could not have vouched for the qualifications of the individual practitioners who cared for Mildred Borgwald as she recovered from injuries received in a fall. And if he could, that information would not necessarily qualify each or any of them as experts. *Schaefer,* 750 N.E.2d at 794. Most especially, though, Dr. Lalouche - who never met or treated Mildred Borgwald - would have no information about whether the information set out in the individual reports and summaries was correct or true. He could not say whether the individual doctor, nurse or therapist followed the correct procedure and accurately recorded his or her observations on a particular day. Only the person who made the record could testify as to what he or she saw and did.

Indiana law recognizes this. In *Faulkner v. Markkay of Indiana, Inc.,* 663 N.E.2d 798 (Ind. Ct. App. 1996), the court stated "we cannot allow an expert's reliance on hearsay to be a ***21** conduit for placing the physician's statements before the jury. The expert witness must rely on his own expertise in reaching his opinion and may not simply repeat the opinions of others" Id. at 801. The Trial Court could not allow Dr. Lalouche to regurgitate those opinions and conclusions as his own without the opportunity to cross-examine the original treating physicians themselves. In addition to the lack of foundation, then, it is the inability to cross-examine the persons who made these particular records which renders some statements contained in them inadmissible. *Schaefer,* 750 N.E.2d at 793-4; *Wilkinson,* 811 N.E.2d at 391.

Here, the Trial Court admitted the certified records to prove that Mildred Borgwald was treated on the dates referenced in the records by the various doctors, nurses and other practitioners shown by the records. Consistent with its ruling on the inadmissibility of the medical opinions in those records, the Trial Court asked the parties to agree on appropriate redactions, and they did so. The Estate's counsel agreed to the redactions line by line. The Estate now complains on appeal that many of the items redacted as part of the records were not opinions and should not have been redacted at all.

Following a lengthy session in which the parties' attorneys combed through the medical records and made redactions, the Estate re-offered the redacted exhibit into evidence:

> COURT: Before we broke, Petitioner had offered Petitioner's Exhibit "4" which were certified records involving the Visiting Nurse treatment of decedent, The objection was a foundation laid for authenticity with the certification, the records contained inadmissible opinions and diagnoses, uh, I sustained the objection, and the parties to see if they could work through the document and redact those portions which were objectionable, the parties have done that?

Mr. RACOP: Yes, judge we have.

(Tr. 56-7) The exhibit was then admitted, as redacted. The same process was used for Exhibit "11", the records of Dr. Janicki. (Tr. 127-28) As is clear from these exchanges, the Estate did not ***22** object to any of the specific redactions or express to the Trial Court that the parties had a disagreement about whether any particular redaction was appropriate or not.

The Estate has waived this argument through its conduct at trial. In general, the failure to object at trial results in waiver of the issue for purposes of appeal. *Herron v. State*, 801 N.E.2d 761, 765 (Ind. Ct. App. 2004); *Boatright v. State*, 759 N.E.2d 1038 (Ind. 2001). The Trial Court never had the opportunity to rule on those alleged disputes, because the Estate never voiced any dispute. Having failed to raise specific objections to the Trial Court, the Estate has waived the issue on appeal. Consequently, if this Court holds that the trial Court was correct in its decision to exclude medical opinions and diagnoses within the medical records, then all of the specific redactions, done by express agreement of the parties in open court, must stand.

C. The Estate was not denied the opportunity to make an offer of proof.

The Estate claims in its brief that the Trial Court refused to allow an offer of proof. This is simply wrong. At trial, during a discussion concerning the number of witnesses yet to be called and the time required to complete testimony, the Estate announced that it would make an offer of proof. The following colloquy occurred:
[Court] [to counsel for the Estate, Scott Racop] How many more do you have?

[MR: RACOP] I have two more.

[Court] Who do you have?

[MR: RACOP] It's Angie McGee, and the other daughter, Kameron McGee.

[Court] Okay, are those going to be the only other two witnesses? -130-

MR.RACOP: The only other one, Your Honor, was the possibility just an offer of proof.

***23** COURT: Well, for the record it is your position that you should be entitled to call Doctor Lalouche?

MR.RACOP: Yes, Your Honor. I understand that there is already a ruling on it.

COURT: I just want to make your record, okay.

MR.RACOP: Okay.

COURT: My understanding is, your position is you want to call Doctor Lalouche to testify?

MR.RACOP: Just as an offer of proof only.

COURT: And to do that, you would elicit from him testimony consistent with the report you submitted.

MR.RACOP: That's right.

COURT: Okay, so I'm going to consider that your offer of proof, that you would call him and elicit testimony based on the report that was submitted to the court.

MR.RACOP: That's right, Judge.

COURT: In the prior motions that we had with respect to his testimony,

MR.RACOP: That's right, Judge.

COURT: So I will consider that your offer of proof, however, my ruling stands as it was before, he was not going to be allowed to be a witness or testify for the reasons I gave in my order. -131 -

MR.RACOP: To that extent, Your Honor, and may it please the court, in rather than having him come here and testify, which I think he is actually available, as part of that offer of proof, would the court allow me just to simply submit the report instead.

COURT: It's already in the court's file.

MR.RACOP: So it would be - can that be recognized by the court that that's already ...

COURT: I thought I just did.

***24** MR.RACOP: Well, I wasn't sure if that's what we were doing, Judge, I'm just confirming it.

COURT: Yes, that's what I just did.

MR.RACOP: And then...

COURT: In other words, he's not coming here and you're not going to put him on the stand and he's not going to give his opinion as your offer of proof, that's not going to happen.

MR.RACOP: Okay. I just wanted to make sure that I understood what the court was willing to do, and what the court is doing. I think I'm clear on it now.

COURT: Okay, so then you have two more witnesses.

MR.RACOP: Yes, Judge.

(Tr. 131-32)

Although the Estate claims it was prevented from making an offer of prove with respect to the expected testimony of Dr. Lalouche, the substance of his testimony was in the report and all parties knew from pre-trial events and the context the case what the evidence would be. As a panel of this Court discussed in *Bedree v. Bedree*, 747 N.E.2d 1192 (Ind. Ct. App. 2001):
Because an appellant may be subject to waiver if he fails to make an offer of proof, we believe that generally, the better course of action is for the trial court to allow an offer of proof so that a record can be made for this court on appeal. However, we do not believe the trial court committed reversible error in this particular instance by disallowing James' offer of proof. Indiana Evidence Rule 103 states that error may not be predicated upon a ruling excluding evidence unless a substantial right of the party is affected and an offer of proof was made or "the substance of the evidence... was apparent from the context." Ind. Evid. R. 103 (a)(2). In this case, the only issue was whether or not the signature on the two deeds was in fact Emily's signature. Clearly, the only testimony James could give which would be relevant to resolution of this issue was for him to testify that Emily had indeed signed the deeds. Thus, the substance of the evidence James would be giving was apparent from the context of the case, and an offer of proof was not strictly necessary.

Id. at 1196. The Estate was allowed to make an offer of proof, and no error occurred.

***25** In addition, the Estate waived appellate review of this issue by failing to object a trial. *See Herron v. State*, 801 N.E,2d 761, 765 (Ind. Ct. App. 2004); *Boatright v. State*, 759 N,E.2d 1038 (Ind. 2001). In fact it was the Estate's own idea to submit the written report: "To that extent, Your Honor, and may it please the court, in rather than having him come here and testify, which I think he is actually available, as part of that offer of proof, would the court allow me just to simply submit the report instead." (Tr. 132). The Estate failed to object and articulate any reason why Dr. Lalouche had to be there in person to testify instead of simply admitting his report. Thus, the Estate waived this issue for purposes of appeal.

D. The terms of Old National's Mortgage were explained to Mildred Borgwald, and her blindness does not invalidate the mortgage.

In its brief, the Estate cites a Indiana Code §33-42-2-2(4) to support the proposition that a mortgage signed by a blind person is not valid unless the notary acknowledging the instrument reads each word of the mortgage aloud to the person. The Estate is incorrect. It is well-settled in Indiana that an acknowledgement is not essential to give effect to a deed as between the grantor and grantee. *Bever v. North*, 107 Ind. 544, 8 N.E. 576 (1886). Likewise a mortgage is valid as between the parties, without acknowledgement. *Perdue v. Aldridge*, 19 Ind. 290 (1862).

The evidence adduced at trial proved that Denise Keegan explained the terms of the mortgage transaction and documents to Mildred Borgwald. (Tr. 233, 251-52) Mildred Borgwald acted in such a way and made such comments as to indicate that she understood that she was obtaining credit and closing a loan which would result in the placement of a mortgage on her home. (Tr. 252, 254-55, 257) And that is enough, according to the decision in *Outlaw v. Danks*, 832 N.E.2d 1108 (Ind. Ct. App. 2005):

> ***26** While it is true that Indiana Code section 33-42-2-2(a)(4) requires a notary to read to a blind person the contents of the document to be notarized, there is no requirement that a will be notarized in order to be valid. See LC. § 29-1-5-3. Thus, Roberts's failure to read the 2003 Will to Lillian does no more than invalidate Roberts's signature as a notary. The Will itself remains valid because all of the requirements under Indiana Code section 29-1-5-3 were present inasmuch as Twaka testified that while at the bank they discussed in Lillian's presence the fact that they were there to execute her Will. ***. And Lillian signed the Will with Tyus's help in the presence of the witnesses. *** Therefore, the 2003 Will was sufficiently published.

Id. at 1111. (Internal references to trial record omitted).

In addition, the Mortgage was not notarized by Denise Keegan, but Alice Weir, another ONB employee. (Tr. 233) Although it had an opportunity to do so, the Estate did not call Alice Weir to elicit testimony about whether or not she read the Mortgage to Mildred. Consequently, there is no evidence in the record at all to support a conclusion that ONB did not comply with the statute. The Estate also never presented any argument to the Trial Court about the legal effect of the notary's alleged failure to read the mortgage to Mildred aloud. Had it done so, ONB would have made the arguments herein, and the Trial Court would have issued a ruling. The Estate did not give the Trial Court the chance, and has therefore waived the argument for purposes of appeal.

E. If this Court determined exclusion of the Estate's expert testimony was erroneous, such error was harmless.

"[E]ven if an evidentiary decision was an abuse of discretion, an appellate court will not reverse if the ruling constituted harmless error." *Spaulding v. Harris,* 914 N.E.2d 820, 829-30 (Ind. Ct. App. 2009) "An error is harmless if it does not affect the substantial rights of the parties." *Id* at 830. "Where wrongfully excluded testimony is merely cumulative of other evidence presented, its exclusion is harmless error." *Id.*

***27** In *Spaulding,* the trial court excluded portions of testimony from a doctor sitting on a medical malpractice review panel, because her opinions were based on a medical article. Other portions of her testimony and other testimony about the facts at issue were taken. This Court held that the excluded physician testimony was merely cumulative of other evidence, and that its exclusion constituted harmless error. *Id* at 830.

In this case, as in *Spaulding,* alternative evidence was presented. Lana McGee and Kameron McGee spent over a full day testifying as to their belief that Mildred was incompetent. Dr. Lalouche's testimony, based on what he believed to be Mildred's deteriorating mental condition, would have mirrored Lana's and Kameron's testimony. As such, the Estate was able to present substantial evidence of Ms. Borgwald's incompetence. If the exclusion of Dr. Lalouche's opinion is deemed to have been in error, that error was harmless. [4]

And even if Dr. Lalouche's opinion was admitted, there was sufficient evidence, as shown by Denise Keegan's and Patrick Duffy's testimony, from which the Trial Court might conclude that Mildred Borgwald was not incompetent at the time she applied for and obtained the mortgage loan. It is the law in this State that non-expert evidence is allowable on issues of insanity or ***28** incompetence. *Guardianship of Carrico v. Bennett,* 319 N.E.2d 625 (Ind. Ct. App. 1974); *Johnson v. Culver,* 19 N.E. 129 (1888); *Ramseyer v. Dennis,* 119 N.E. 716 (1918). Opinion testimony of a medical expert does not preclude the trier of fact from considering and weighing non-expert evidence when such a matter is in issue. *Klinger v. Caylor,* 267 N.E.2d 848 (1971); *Dudley Sports Co. v. Schmitt,* 279 N.E.2d 266 (1972).

VI. CONCLUSION

WHEREFORE Appellee Old National Bank prays that the court affirm the judgment of the Trial Court in all respects, and for all other relief just and proper in the premises.

Footnotes

1 Filings that are referenced herein that were not included in Appellant's Appendix (hereinafter, "App.") will be submitted with Appellee's Appendix (hereinafter, "Appellee's App.").

2 The Estate mistakenly used the year 2011 on its Certificate of Service, but correspondence included with service of the document upon opposing parties reveal this document to be the correct April 16, 2012 list.

3 Without formal responses to the Request for Production, it was impossible for ONB and Pound to determine whether any documents were held back as privileged, as work product or for some other reason.

4 In addition, even if the Trial Court had believed Dr. Lalouche or the other witnesses of the Estate, the proper remedy would not be to void the mortgage, but to order rescission:

> [By] the great weight of authority the further rule is established that, where a contract has been entered into with an insane person in good faith, without fraud or imposition, for a fair consideration, without notice of the insanity, before an adjudication of insanity, and has been executed in whole or in part, *the contract will not be set aside unless the parties can be restored to their original position.* *Wells v. Wells*, 150 N.E. 361. 363 (Ind. 1926). Mildred was never adjudged incompetent by any court, The Estate introduced no evidence whatsoever that ONB acted in bad faith or treated Mildred unfairly. The Trial Court's findings reflect that ONB treated Mildred fairly, like any other borrower applying for a loan (App. 27-8). As such, even if the Trial Court had found Mildred to be incompetent at the time she signed the mortgage, the Estate would have been obliged to repay the loan before avoiding the lien.

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